232036

BEFORE THE
SURFACE TRANSPORTATION BOARD

CF INDUSTRIES, INC.	)	
Complainant,	)	
v.	)	**Docket No. FD 35517**
INDIANA & OHIO RAILWAY COMPANY, POINT COMFORT AND NORTHERN RAILWAY COMPANY, AND MICHIGAN SHORE RAILROAD, INC.	)	
Defendants.	)	

REBUTTAL EVIDENCE OF THE DOW CHEMICAL COMPANY

The Dow Chemical Company ("Dow") hereby submits its Rebuttal Evidence in the above-captioned proceeding pursuant to the procedural schedule issued by the Surface Transportation Board ("Board") on September 30, 2011. The evidence filed in this proceeding confirms that the priority train service ("PTS") proposal at issue in this case is unreasonable in violation of 49 USC § 10702 and causes a violation of the common carrier obligation of 49 USC § 11101. In support hereof, Dow states as follows.[1]

I. Summary of Argument.

RailAmerica, Inc. and four of its subsidiaries[2] (collectively "Respondents") have been discussing the PTS proposal with Dow and other shippers for well over one year. In that time period, there has been no reasoned explanation, let alone defensible evidence, that PTS will

[1] Dow is a member of the American Chemistry Council ("ACC") and the Chlorine Institute, Inc. ("TCI"), and supports the joint Rebuttal Evidence filed by ACC, TCI, and several other parties.
[2] The RailAmerica subsidiaries participating are Alabama Gulf Coast Railway LLC, Indiana & Ohio Railway Company, Point Comfort and Northern Railway Company, and Mid-Michigan Railroad, Inc.

increase safety. Given that the issue of TIH/PIH rail transportation safety has been so painstakingly researched, evaluated, and subject to notice-and-comment rulemaking by numerous federal agencies for many years, Respondents' actions are not rendered reasonable simply by claiming the mantle of "safety." Briefly put, Respondents have not met their burden of proof. In a last-ditch effort to save the PTS proposal, Respondents just two weeks ago proffered the verified statement of a new consultant in the reply evidence, but this effort utterly fails to justify the reasonableness of PTS.

Especially in light of the filings that have been made in this proceeding, which show that PTS would create various problems and complications, the PTS proposal is undoubtedly an unreasonable practice in violation of 49 USC § 10702 and a breach of the common carrier obligation in 49 USC § 11101. It is noteworthy that the other railroad entities participating in this proceeding express no support for the PTS proposal. Stripped of their rhetorical and misleading remarks, the filings of the Association of American Railroads ("AAR") and Norfolk Southern Railway Company ("NS") add little to this debate other than a stark reminder that Respondents stand alone in trying to defend the unreasonable PTS proposal.

II. The Board must act to protect the common carrier obligation.

A. Regulation is necessary.

Under 49 USC § 11101, railroads must provide service on reasonable request. In the past several years, the nation's freight railroads have been nearly unanimous in their proclamation that they do not want to transport TIH/PIH commodities[3], and only do so because of the common

[3] See, e.g., Comments of Howard Elliott, CSX Transportation, Inc., Common Carrier Obligation of Railroads – Transportation of Hazardous Materials, STB Ex Parte No. 677 (Sub-No. 1), tr. at 414 (hearing July 22, 2008) ("Given a choice, CSX Transportation would decline to handle toxic inhalation hazard materials."); Comments of James Hixon, Norfolk Southern Railway Company, Common Carrier Obligation of Railroads, STB Ex Parte No. 677, tr. at 49 (hearing April 25,

carrier obligation and Board decisions in cases like Union Pacific Railroad Company – Petition for Declaratory Order, STB Docket No. 35219 (served June 11, 2009). Due to these railroad statements that they do not want to transport TIH/PIH commodities, the common carrier obligation acts as a final protection for shippers.

NS contends that the Board should allow railroads freedom to implement operating practices that they determine are appropriate. See, e.g., NS Reply at 3 ("[t]he Board should issue a decision confirming that railroads have flexibility to make their own judgments about how to transport TIH"). However, railroad practices are never immune from Board oversight. 49 USC §§ 10702 and 10704. Especially in an environment where railroads have unequivocally stated they do not wish to transport TIH/PIH commodities, operating procedures adopted by railroads could be used to prevent shipments of "undesirable" commodities if there is no oversight. The Board must review proposed practices, like the PTS proposal of Respondents, in order to proscribe those with no demonstrated safety benefit but which have a significant cost.

B. The Board should reject the effort to insulate these practices from review.

Under 49 USC § 10702, railroad practices must be reasonable. The statute is not limited to whatever practice may be called a "tariff" by the implementing railroad. Nevertheless, Respondents have erroneously asserted that their practices cannot be reviewed by the Board if they are not contained in a tariff. See, e.g., Respondents' Reply at 4-6 (claiming only tariffs are subject to Board review, not Respondents' Standard Operating Practices ("SOP") or "negotiating tools"). There is no such limitation in 49 USC § 10702, and Respondents' attempt to insulate their practices from review must fail. Adoption of Respondents' view would create a giant loophole in the statute: railroads could insulate their practices from Board review simply by

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2008) (stating that he would not advise his management to continue transporting TIH commodities if the common carrier obligation did not require it).

naming them "operating protocols", "policies", "standards of service", or some similar term. See also ACC et al. Reply at 3-4 (describing the "shell game" played by Respondents with the constantly changing tariffs and attempts to insulate the challenged practices from review by removing them from tariffs). The Board should reject Respondents' attempt to limit the Board's jurisdiction.

C. Dow's request for regular train service is reasonable.

Railroads must provide rail transportation on reasonable request. 49 USC § 11101. Dow has requested, and continues to request, regular TIH/PIH train service from Respondents. This train service is subject to comprehensive safety regulations managed and overseen by the Federal Railroad Administration ("FRA"), the Pipeline and Hazardous Materials Safety Administration ("PHMSA"), and the Transportation Security Administration ("TSA"), which have determined that TIH/PIH commodities can be transported safely and securely in regular train service. "FRA promulgates and enforces a comprehensive regulatory program." 74 FR 1770, 1772 (Jan. 13, 2009). The nation's railroads recognize the comprehensive nature of federal safety regulations. See, e.g., CSX Transportation, Inc. – Petition for Declaratory Order, STB Docket No. 34662, slip op. at 3 (served March 14, 2005). Congress has specifically directed the Department of Transportation ("DOT") "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents" and to "prescribe regulations for the safe transportation, including security, of hazardous materials in intrastate, interstate, and foreign commerce." 49 USC §§ 20101 and 5103(b)(1).[4] Dow has previously provided a brief description of this comprehensive regulatory regime. See Dow Opening at 11-14.

[4] These duties have been delegated to FRA and PHMSA. See 49 CFR §§ 1.49 and 1.53.

The comprehensive regulatory regime enforced by FRA, PHMSA, and TSA is the result of many years of analysis, public comment, scientific study, meetings, hearings, and rulemaking proceedings. As just one example, PHMSA recently promulgated a final rule regarding TIH/PIH tank car design and operations. 74 FR 1770 (Jan. 13, 2009). Even before issuing the Notice of Proposed Rulemaking ("NPRM"), PHMSA engaged jointly with FRA in a multi-year "comprehensive review of design and operational factors that affect rail tank car safety." 73 FR 17818, 17819 (April 1, 2008). Several public meetings were held, comments were sought, and research was conducted. It was only "after careful review and consideration of all of the relevant research and data, oral comments at the public meetings, and comments submitted to the docket" that PHMSA issued the NPRM. 73 FR 17820.

Due to this extensive and comprehensive regulatory structure, Dow's request for regular TIH/PIH rail transportation is reasonable under 49 USC § 11101. In the face of overwhelming efforts by several federal agencies to promote safe transportation of TIH/PIH commodities, Respondents cannot simply refuse to provide the service requested by Dow. The request for regular TIH/PIH service is reasonable, and Respondents' attempt to force PTS on Dow violates both the common carrier obligation of the 49 USC § 11101 and the mandate of 49 USC § 10702 that practices must be reasonable.

D. Railroad practices must still be reasonable, even if railroads do not want to transport TIH/PIH.

NS suggests that the Board should turn a blind eye to railroad practices regarding TIH/PIH because the Board has forced railroads to transport TIH/PIH. NS Reply at 9. This incredible suggestion is tantamount to asking the Board to ignore its statutory responsibility under 49 USC § 10702. Only Congress can change the statutory standards applicable to railroads, not the Board.

III. Respondents have not countered the showing by Dow and the other protesting parties.

Of all the parties that have made filings in this proceeding, only Respondents have asserted that the PTS proposal is a reasonable practice. All other parties have either demonstrated that the PTS proposal is an unreasonable practice and causes a violation of the common carrier obligation (Dow; CF Industries, Inc.("CF"); and ACC et al.[5]) or taken no position on the PTS proposal (NS and AAR[6]). Despite Respondents' assertions of legality, Respondents have not made any cognizable showing that the PTS proposal is lawful, nor have Respondents refuted the ample evidence put forth by Dow, CF, and ACC et al. Respondents' contentions must necessarily fail.

A. The burden of proof is on Respondents.

As extensively described in prior pleadings in this case, the existence of a comprehensive regulatory regime regarding rail transportation of hazardous materials means that Respondents must demonstrate that the existing safety standards are insufficient for their particular needs. ACC et al. Opening at 8-10; Dow Opening at 5 and 7-10; and CF Opening at 4-5 and 9-12. Conversely, Respondents, AAR, and NS all contend that, consonant with the general rule in unreasonable practice cases[7], the burden of proof should be on the protesting parties. See, e.g., Respondents Reply at 11-13; AAR Reply at 7-10; and NS Reply at 12-14.

Under existing regulations and precedent, the burden is properly on Respondents to support the PTS proposal. 49 CFR § 174.20(a); Consolidated Rail Corporation v. Interstate Commerce Commission, 646 F.2d 642, 650 (D.C. Cir. 1981) (noting that the burden is on

[5] See, e.g., CF Opening at 1; ACC et al. Opening at 10.
[6] See, e.g., NS Reply at 10; AAR Reply at 2.
[7] Dow does not dispute that this is typically the case. See, e.g., Dow Opening at 8.

Conrail "to show that, for some reason, the presumptively valid DOT/NRC regulations are unsatisfactory or inadequate in their particular circumstance") ("Conrail").

Respondents and the railroad parties contend that the Conrail holding was superseded by the Staggers Act and other statutory changes over the past three decades. See, e.g., Respondents' Reply at 11 ("Conrail was decided...under a different statutory scheme."); AAR Reply at 8 ("the Court's language in Conrail...was in the context of that particular case and under a completely different statutory framework"); NS Reply at 13 (asserting that Conrail "arose under a statutory scheme that no longer exists"). The single-minded focus on the statutes in place at the time of Conrail ignores the plain language of the Court's decision. See, e.g., 646 F.2d at 650 ("Where DOT and NRC, pursuant to specific statutory authority, have established 'complete and comprehensive' safety standards...a presumption arises that expenditures for safety measures not specified by these agencies are unnecessary and fail to satisfy the criteria for reasonableness..."). Cf. Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company, STB Docket No. 42056, slip op. at 4 (served July 27, 2011) ("The plain language of the Board's decisions in this case is contrary to TMPA's position."). In other words, the plain language of the Court's decision reveals that the Court in Conrail did not place the burden on the railroad due to any particular statute or the procedural posture of the case, but because there existed a comprehensive regulatory safety regime established by other agencies pursuant to federal law. See, e.g., Dow Opening at 8-9.

The fact that the Staggers Act and the Interstate Commerce Commission Termination Act ("ICCTA") did not change matters is confirmed by a recent opinion of the U.S. Court of Appeals for the D.C. Circuit. North American Freight Car Association v. Surface Transportation Board, 529 F.3d 1166 (D.C. Cir. 2008) ("NAFCA"). In this case, the Court considered applying a

presumption similar to that in Conrail but did not do so because there was no comprehensive federal regulatory regime over the subject matter of the challenged practice. NAFCA, 529 F.3d at 1174 (n. 7). AAR ineffectually tries to explain away the Court's mention of Conrail in footnote 7 of NAFCA. AAR contends that (1) the NAFCA Court was merely drawing a "contrast" between the two cases, and (2) the NAFCA Court stated that the petitioner bore the burden of proof in the NAFCA proceeding before the Board. See AAR Reply at 9 (n. 9). Dow does not disagree with either statement.

There is a distinct contrast between Conrail and NAFCA, and it is this contrast which shows why the burden was properly on the railroad in Conrail and the protesting shippers in NAFCA. In Conrail, the railroad established operating practices in an area already comprehensively regulated on the federal level; therefore, the presumption was that the railroad's additional requirements were unreasonable, and the burden was on the railroad. Conrail, 646 F.2d at 650 and 651. In contrast, there was no comprehensive federal regulatory regime regarding demurrage practices in NAFCA; therefore, no presumption of unreasonableness attached and the burden was properly on the protesting shippers. In footnote 7, the NAFCA court clearly stated that a presumption arose when there was a comprehensive preexisting federal regulatory scheme, but that no such presumption arose in NAFCA. The Court did not rely on (or even mention) the existence of statutory authority as the basis for the existence of a presumption. NAFCA, 529 F.3d at 1174 (n. 7). Consequently, NAFCA shows that it is the existence of a comprehensive federal regulatory regime based on federal law that places the burden of proof on

the railroad, not any particular statute.[8] Respondents, NS, and AAR are simply incorrect when they claim that the Staggers Act and ICCTA have invalidated Conrail.

B. Respondents have merely stated that it is "obvious" that the STS proposal is safer.

Respondents have not shown that regular TIH/PIH service is "unsatisfactory or inadequate in...[the] particular circumstance[s]" to meet Dow's request for rail service. Conrail, 646 F.2d at 650. Nor have Respondents pointed to any "local conditions [that] make the acceptance, transportation, or delivery of [Dow's] hazardous materials unusually hazardous." 49 CFR § 174.20(a). In fact, Respondents have not even made any effort to meet either of these standards; Respondents have merely stated that it is "obvious" that the PTS proposal provides safety benefits. Respondents' Reply at 4. The evidence and filings made by Dow and the other protesting parties, such as the testimony of Dr. Dipen Shah (ACC et al. Reply at Attachment A), highlight the conclusory and ultimately erroneous nature of Respondents' position. Respondents have not even attempted to refute several arguments made by Dow and the protesting parties. See Section III.C. In light of the comprehensive safety regulations administered by several federal agencies, simply claiming a safety purpose is not sufficient to justify Respondents' desired operating practices.

C. Respondents have not refuted the showing made by Complainants.

Not only have Respondents not met their burden of proof in this case, but they have also not refuted the ample evidence proffered by Dow and the other protesting parties. Respondents' failure to address or, at times, even mention the arguments of the Complainants indicates that

[8] Indeed, the NAFCA Court clearly stated that the presumption in Conrail arose "from the regulatory regime there" and not from any particular statute. NAFCA, 529 F.3d at 1174. Footnote 7 reveals that the phrase "regulatory regime" referred to the existence of comprehensive DOT and NRC regulations in Conrail.

Respondents concede the points raised. For example, the evidence that has not been addressed by Respondents includes:

- Dow's explanation of the safety issues that would be created by PTS shipments of AHCl. Dow Opening at 19-20.
- The real-world experience of Florida East Coast Railway ("FEC"). Dow Opening at 18.
- The verified statement of Frank Reiner, President of the Chlorine Institute, Inc. ACC et al. Opening at Attachment C.
- The fact that shippers cannot control the operations of railroads and, thus, cannot comply with the 3-car maximum contained in PTS. Dow Opening at 24-25.

The evidence on these four issues is unopposed, and strongly supports the view that the PTS proposal is an unreasonable practice. Respondents' failure to refute these four items warrants a Board finding that PTS is an unreasonable practice. Climate Master Inc. and International Environmental, Inc. - Petition for Declaratory Order Certain Rates and Practices of Trans Tech Solutions, Inc., F&M Bank, and Midland Transportation Co., STB Docket No. 42085, slip op. at 2 (served Sept. 28, 2004) (Board relies on "unrefuted evidence" to find challenged practice to be unreasonable). Cf. Arkansas Electric Cooperative Corp. - Petition for Declaratory Order, STB Docket No. 35305 (served Mar. 3, 2011), slip op. at 3 ("we must resolve this controversy based upon the evidence available at this time") ("AECC").

Even where Respondents address evidence and argument of Dow and the other protesting parties, Respondents' reply has been unconvincing or just plain misleading. For example, Respondents claim that Dow believes PTS to be unreasonable simply because it is not mandated by FRA, PHMSA, or TSA. Respondents' Reply at 4. This is an inaccurate depiction of Dow's position. Dow has clearly stated that the burden of proof is on Respondents due to the

presumption established by the existing comprehensive regulatory regime of FRA, PHMSA, and TSA, and also due to 49 CFR § 174.20(a). Dow Opening at 8-10 and 15.

Similarly, Respondents attempt to distort Dow's argument that PTS is an unreasonable practice under Rail Fuel Surcharges, STB Ex Parte No. 661 (served Jan. 26, 2007). Respondents' attempt fails, as Dow shows in Section IV.

AAR is not immune from the distortion bug. AAR alleges that Dow believes "the Board is constrained by Conrail to consider only a cost-benefit analysis in evaluation of railroad safety practices." AAR Reply at 5. This is not even remotely close to Dow's stated position. Dow clearly quoted the Board's recent statement that "any tariff provision must be reasonably commensurate economically with the problem it addresses." Dow Opening at 10, citing AECC, slip op. at 6. Dow also noted that this is similar to the viewpoint expressed by the Court in Conrail. Dow Opening at 11. At no point did Dow state that the Board should only use a cost-benefit analysis to evaluate the reasonableness of a practice. In fact, Dow clearly cited to the well-known precedent that the Board evaluates the reasonableness of a practice on a case-by-case, fact-specific basis because Congress has not specifically stated what makes a practice unreasonable. Dow Opening at 9-10.[9]

Additional support for Complainants' position was offered in the reply round of evidence. For example, ACC et al. submitted the testimony of Dr. Dipen Shah, the Chief Engineer with HLA Engineers, Inc. See ACC et al. Reply at Attachment A.

[9] This is the same standard cited by AAR. AAR Reply at 3.

D. The authorities cited by the railroad entities are ineffectual and/or misleading.

1. The Board should ignore the railroad entities' straw man arguments.

Dow has never stated that the existing FRA, PHMSA, DOT, and TSA regulations governing rail transportation of TIH/PIH are a "ceiling" on what measures can be employed. Nonetheless, AAR and NS both construct the "ceiling" straw man in order to provide some substance for the lack of showing made by Respondents in this case. See, e.g., AAR Reply at 3-4; NS Reply at 15. Similarly, Dow has never stated that PTS is unreasonable "simply because" it is not "mandated" by FRA, PHMSA, or TSA. Respondents' Reply at 4. Dow's position is that Respondents have not met, or even attempted to meet, the burden of proof as described in Conrail and 49 CFR § 174.20(a). Under Conrail, Respondents must defeat the presumption that exists by, for example, showing "some unusual or special conditions" related to their operations that make PTS reasonable. 646 F.2d at 651. Under 49 CFR § 174.20(a), Respondents must point to "local conditions" that make the transportation of hazardous materials "unusually hazardous." Respondents have not met these standards. Instead, Respondents have stated that PTS "obviously" provides safety benefits. Respondents' Reply at 4. Alleged "obviousness" does not meet Respondents' burden under Conrail or 49 CFR § 174.20(a).

Dow is strongly committed to safety, and has embraced reasonable railroad practices that are proven to increase safety. No such defensible proof has arisen in the year and a half since Respondents first began publicly discussing PTS. Crucially, in fact, evidence filed in this proceeding suggests that PTS may reduce safety. See Section III.C. Under these circumstances, PTS is clearly an unreasonable practice.

2. The Board should reject the railroad entities' misleading and out-of-context citation to the Federal Register.

Respondents, AAR, and NS have all relied upon a quotation from a Federal Register notice to support their various positions, but this sentence was taken out of context. All three parties happily note that PHMSA and FRA recently stated "parties are encouraged to go beyond the minimum regulatory requirements in establishing and implementing plans, rules, and procedures for safe transportation operations." Respondents' Reply at 4 and 12; AAR Reply at 4; NS Reply at 15-16. The single sentence is cited by the rail parties to make it seem as if FRA and PHMSA are giving railroads carte blanche to impose any operating practice on shippers, as long as it is claimed to be safety-related. However, the statement explicitly addresses its comments to "parties" and not just railroads. Moreover, the subsequent sentence reveals that FRA and PHMSA were only addressing "additional requirements that a party voluntarily imposes upon itself." 74 FR 1793 (emphasis added). Clearly, the PTS proposal is being imposed upon shippers, and it is involuntary from their perspective. The simple fact that Dow and various shipper organizations are participating in this proceeding and are vehemently opposed to the PTS proposal reveals that PTS is not simply being imposed by Respondents upon themselves.

3. The Board should ignore NS's inflammatory and misleading allegation.

NS contends that Dow's opposition to the 3-car maximum per train indicates that Dow is "seek[ing] every opportunity" to get TIH/PIH cars "into the railroads' custody as quickly as possible." NS Reply at 7. According to NS, "the sooner Dow can hand that chlorine to a railroad and – at least for a time – absolve itself from as much responsibility for it as possible, the better life is for Dow." NS Reply at 7. These remarks are inflammatory, unnecessary, and

simply wrong. Safety is a foundational principle for everything that Dow does. See Dow Opening at 2-4. Dow deals with extensive safety issues every day as part of its manufacturing processes. FRA and PHMSA described Dow as "a driving force behind the Next Generation Rail Tank Car Project." 74 FR 1773.[10] RailAmerica has recognized "Dow's leadership role in safety...and continuous improvement." Dow Opening at Ex. 1. Union Pacific Railroad Company has stated that "Dow in particular stands out" as a partner that has "worked with us very cooperatively to reduce risk throughout the entire supply chain and we are very grateful for that." Comments of J. Michael Hemmer, Union Pacific Railroad Company, Common Carrier Obligation of Railroads, STB Ex Parte No. 677, tr. at 142 (hearing April 24, 2008). It was Dow that offered to join with RailAmerica in engaging in a scientifically-based study of the safety impact of the PTS proposal. Dow Opening at 20-23.

The assertion that Dow wants to transfer TIH/PIH rail cars expeditiously to railroads in order to escape responsibility as quickly as possible is nonsensical given the scope of Dow's operations. Dow is one of the world's largest chemical companies. Dow processes, manufactures, and handles TIH/PIH and hazardous commodities on a daily basis at hundreds of locations around the globe, and it does so safely because of its extensive and comprehensive safety protocols throughout its operations. Therefore, it is ludicrous for NS to suggest that "the sooner Dow can hand that chlorine to a railroad and...absolve itself from as much responsibility for it as possible, the better life is for Dow." NS Reply at 7.

NS's contention also ignores the fact that Dow manufactures chlorine and other products because the world needs and demands them, and because they are essential to supporting modern life as we know it and promoting human heath and well-being. Dow's products are used for

[10] From review of the Federal Register notice, it appears that, although Dow made the effort to participate in this proceeding regarding rail tank car improvements, NS did not. See 74 FR 1770.

basic human necessities such as fresh water and food, as well as pharmaceuticals, renewable energy, and a nearly limitless array of other goods. In fact, Dow's products make possible approximately 90% of the goods people use every day. See Dow Opening at 2.

E. The Wolf Verified Statement does not salvage Respondents' PTS proposal.

Exhibit A of Respondents' Reply, which is Respondents' last-gasp effort to salvage the doomed PTS proposal, fails on numerous fronts. As an initial matter, Respondents fell prey to what is known as "confirmation bias"; in other words, Respondents made their decision first, and then searched for evidence in an effort to support the decision.[11] In contrast, PHMSA took the correct approach by performing an in-depth study of rail tank cars and operating practices before issuing a Notice of Proposed Rulemaking. 73 FR 17819 (PHMSA and FRA engaged in a multi-year "comprehensive review of design and operational factors that affect rail tank car safety" in advance of the NPRM).

Respondents' confirmation bias is clearly visible in the report of their consultant Gary Wolf. He was not tasked with determining whether there is any way to increase TIH/PIH transportation safety on any of Respondents' railroads, nor was he tasked with determining whether PTS actually increases safety in any particular scenario. Instead, Mr. Wolf was given the "objective" of "quantify[ing] the reduction in derailment and product release risk for TIH/PIH shipments using new operating guidelines for TIH/PIH shipments as promulgated by Rail America." Respondents' Reply at Ex. A, App. A, p. 2. In other words, he was told what the answer was, and then asked to confirm it. He was not asked whether PTS is safer; he was told to assume it is safer and develop a way to quantify the safety.

[11] See, e.g., Marmi E. Graniti D'Italia Sicilmarmi, S.p.A. v. Universal Granite and Marble, No. 09-C-5529, slip op. at 1 (N.D. Ill., Nov. 24, 2010).

Respondents' haphazard approach to safety analysis reveals that critical questions were left unanswered. In purported support of the PTS proposal, Mr. Wolf states that an F-coupler will puncture an unpressurized chlorine tank car at 25 mph, but not at 10 mph. Wolf V.S. at 3. This statement leaves many questions unaddressed, such as:

- Is this type of impact likely to occur on Respondents' tracks?
- Is an impact with an F-coupler under the assumptions of Mr. Wolf (regarding relative car location, for instance) likely or even possible?
- Is this the only, or even most likely, way that a chlorine car would be punctured?
- Why does this finding conflict with that of the FRA, which found, after reviewing 40 years of incident reports, that there has never been a catastrophic loss of chlorine at a speed below 30 mph? See 73 FR 17818, 17821.
- How does the percent likelihood of this type of puncture compare to the percent likelihood of the increased risks posed by PTS, as described in Section III.C herein?

Mr. Wolf does not address or even mention the recent PHMSA/FRA determination that:

> Because the secondary car-to-car impact speed in a derailment or collision scenario is approximately one-half of the initial train speed, designing and constructing tank cars to withstand shell impacts of at least 25 mph and limiting the speed of those tank cars to 50 mph will ensure that in most instances, the car will not be breached if it is involved in a derailment or other type of accident.

73 FR 17821. Pursuant to this determination, train speed would have to be 50 mph to enable a 25 mph F-coupler collision of the type hypothesized by Mr. Wolf. See also Dow Opening at 14. The focus on train speed also ignores other characteristics of train service.

Even if slower trains are assumed to be safer, the slowest possible speed might be the safest, but would it be measurably different than 25 mph? In evaluating 40 years of data, the FRA found no catastrophic losses of chlorine at speeds below 30 mph. See 73 FR 17821.

Would the slowest possible speed meet the common carrier obligation of 49 USC § 11101 and the reasonable practice mandate of 49 USC § 10702? Would it meet the needs of the nation and the world for the transportation of these crucial commodities?

Mr. Wolf also makes dramatic judgment leaps in his attempt to meet the "objective" put before him by Respondents. As one example, Mr. Wolf states that PTS cars travel a shorter distance from the point of derailment than cars in a "typical" freight train. Wolf V.S. at 2. From this one conclusion, he suddenly states "derailment damage" is reduced, but he never explains or justifies the assertion that distance from derailment correlates to "derailment damage." Wolf V.S. at 2. Mr. Wolf also does not show that the "typical" freight train mimics or even approximates the actual freight service provided by Respondents' railroads in the absence of PTS.

Finally, Mr. Wolf apparently evaluated ten years of FRA data, and found that the overwhelming majority of main track derailments occur at speeds greater than 10 mph, and on train consists of more than 10 cars. Wolf V.S. at 2. However, there is no evaluation of whether main track trains under 10 mph and under 10 cars are prevalent. If there are very few main track trains under 10 mph and/or under 10 cars, then, of course most derailments will be over 10 mph and over 10 cars. The supposed probity of Mr. Wolf's findings evaporate upon inspection.

IV. Rate reasonableness is not at issue.

A. Dow has never raised the issue of rate reasonableness.

Respondents raise the specter of a rate reasonableness case in an apparent attempt to distract the Board from the real issues at play here. Respondents' Reply at 18-20. Respondents' concerns are misplaced and reflect a fundamental misreading of Dow's Opening Evidence. Dow plainly stated that it is "not challenging the specific rate level charged by Defendants for any

particular movement." Dow Opening at 25. In other words, Dow is not challenging the rate for PTS, Dow is challenging the contention that PTS is a reasonable practice (and comports with the common carrier obligation) when Dow has requested regular TIH/PIH service.

In the extensive dialogue between Dow and RailAmerica during 2010 and 2011, a time in which executives from Dow held at least two face-to-face meetings with their RailAmerica counterparts, exchanged countless letters and e-mails, and attempted to develop a draft charter to utilize resources from both companies in the interest of safety, Dow never once raised the issue of rates with RailAmerica. See Dow Opening at 20-23 (describing the dialogue between the parties). Instead, Dow was and has been focused on trying to determine if the PTS proposal meets the safety goals ascribed to it. Dow even suggested that RailAmerica and Dow partner in a safety study to evaluate the effects of the PTS proposal, a suggestion that was rejected by RailAmerica. Dow Opening at 21-22; Respondents' Reply at 18 (n. 22).

B. The fuel surcharge analogy is apt.

In its Opening Evidence, Dow cited to the Board's decision in Ex Parte No. 661, Rail Fuel Surcharges, due to the similarities between that case and Respondents' PTS proposal. In that proceeding, the Board found it to be misleading and an unreasonable practice for railroads to use the term "surcharge" when their fuel surcharges were designed to recover more than their fuel costs. Rail Fuel Surcharges, slip op. at 7 (served Jan. 26, 2007) (noting that the term surcharge "most naturally suggests a charge to recover increased...costs associated with the movement to which it is applied" and "[w]e believe that imposing rate increases in this manner...is a misleading and ultimately unreasonable practice").

Similarly, Respondents' have repeatedly used the term "surcharge" to describe the additional fee that shippers would pay for PTS. See, e.g., Respondents' Opening at Ex. B (p. 6,

8, and 9 of SOP dated Jan. 18, 2010; and p. 10, 12, 16, and 17 of SOP dated July 30, 2010). Moreover, Respondents have stated that they are engaging in cost recovery with the additional PTS surcharge. See, e.g., Respondents' Opening at Ex. B (p. 6 of SOP dated Jan. 18, 2010; and p. 10 of SOP dated July 30, 2010). Finally, Respondents have admitted that the PTS surcharge dramatically increases their profit margin. See, e.g., Respondents' Opening at Ex. B (p. 19 of SOP dated July 30, 2010).

Given these similarities, it was entirely proper for Dow to highlight, in this unreasonable practice case, the disconnect between the "surcharge" language and the profit increases. This is exactly what the Board did in Rail Fuel Surcharge, which obviously was not a rate case. Under the Rail Fuel Surcharge precedent, Respondents' use of the terms "surcharge" and cost recovery is an unreasonable practice in violation of 49 USC § 10702 because the additional PTS surcharge does much more than recover Respondents' costs of providing PTS – the PTS surcharge results in a significant profit.

Respondents emphasized Dow's remark that "PTS has become a profit center." Respondents' Reply at 18. Under the rule of Rail Fuel Surcharges, PTS is an unreasonable practice if Respondents describe it as a "surcharge", which they have, and if the surcharge recovers more than Respondents' costs of providing the service, which it does. Hence, the quoted statement is relevant to the reasonableness of the practice under 49 USC § 10702, and Respondents' concerns about a rate case are misplaced.

V. Conclusion.

The Board should find that Defendants' PTS proposal is an unreasonable practice in violation of 49 USC § 10702 and causes Defendants to violate their common carrier obligation under 49 USC § 11101. Injunctive relief is appropriate under 49 USC § 721(b)(4).

Respectfully Submitted

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March 13, 2012

Certificate of Service

I hereby certify that on this 13th day of March 2012, a copy of the foregoing Rebuttal Evidence of Dow Chemical Company was served by electronic delivery and first-class mail, postage prepaid, on counsel for Defendants at:

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The foregoing was also served via first-class mail, postage prepaid. on all other members of the service list.

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